In the Supreme Court of the United States

OCTOBER TERM, 1940

No.....

JAMES F. McKAY, et al.,
Petitioners,

vs.

RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION #1067, et al., and HOWARD AUTOMOBILE COMPANY, a corporation,
Respondents.

Brief in Support of Petition for Writ of Certiorari

A statement of the case has been given in the Petition (pp. 2-5) and to avoid duplication is not repeated.

References to the opinions below are supplied in the Petition. (p. 5)

SPECIFICATION OF ERRORS.

The decision of the California Supreme Court was erroneous in respect of each of the questions specified

under the head of Questions Presented in the Petition (Questions Presented Nos. 1 to 12 inclusive), the same being hereby assigned as the errors intended to be urged.

SUMMARY OF ARGUMENT.

1(a). The decision of the Supreme Court of California denied to petitioners the fundamental right to self-organize free from employer interference (This right is recognized and guaranteed by Sections 1, 7 and 8 of the National Labor Relations Act); because it authorized the employer to coerce petitioners, at the instigation and coercion of defendant unions, to join defendants' organization against their will.

1(b). This right of the employees not to be interfered with by the employer in self-organization is by necessary inference recognized and guaranteed by the Norris-La Guardia Law. (47 Stats. 70 Sec. 2, 4 sub. (b) (f).) Declaring the public policy of the United States in favor of the right freely to self-organize, it clearly declared the public policy of the United States forbidding the contrary.

1(c). This right to combine for the lawful purpose of collective bargaining has long been recognized, and has not in many years been denied by any Court. It is a fundamental right. It is not given by Section 7 or any other section of the Wagner Act. It existed before that act was passed. The Act simply guarantees the right. The right has been held to be a property right. It is part of the liberty and property of which

the State may not deprive one without due process of law under the due process clause of the XIV Amendment.

2. The allegation that petitioners "United and organized in accordance with the Wagner Labor Relations Act" is all that is necessary to invoke the act's protection. It necessarily alleges that the employment of petitioners brought them within the purview of the Act.

3. The employees may exercise and assert this right to self-organize even though the employer is not engaged in interstate commerce. The Wagner Act applies not only to technical interstate business, but to any business in which strikes and other forms of industrial strife and unrest, having the intent or the necessary effect of burdening or obstructing commerce by materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods *from* or *into* the channels of commerce. (49 Stats. 449, Section 1, Par. 1, Section 2, subd. (6), (7).) The power of Congress is protective, not merely corrective, and may be, and in the Wagner Act has been, exerted to strike down any threat to interstate commerce inside or out of it.

4. This right of employees to self-organize in an appropriate bargaining unit, free from employer interference, does not depend on certification of their organization as the proper bargaining unit. If the employer freely recognizes the right and the unit is an appropriate one (i. e., not an inappropriate one),

there is no controversy justifying a complaint to the Labor Board, on which alone the Board's jurisdiction to hold an election and certify depends.

5. The Self-Organizing Employees need not embrace all the crafts in an industry or business. The members of any appropriate (not inappropriate) unit may assert the right, and the employer may lawfully deal with them, until the Labor Board says no.

6. "Outside" affiliation is not requisite to the right.

7. If the unit is appropriate and the self-organization is in good faith and free from employer interference, the employees may assert the right to self-organize, before adopting a constitution, by-laws, pledges or rules, and need not have such to assert the right.

8. When employees assert and avail themselves of their right to self-organize, the burden of "negativing" all "unity of interest" between self-organizing employees and their employer lies on those who oppose, not those who assert the right. To hold the contrary is to embarrass and impede the right.

9. Judicial action in the disposition of an appeal, purporting to find and recite, on no evidence, that self-organized employees have no constitution, by-laws, pledges or rules, and that there is an apparent unity of interest between self-organized employees and their employer, deprives such employees of liberty and property without due process of law under the XIV Amendment.

10. The decision by the Court of last resort of the state, construing Section 921 of the California Labor Code, to authorize an employer to coerce members of an inside labor organization and other employees to join an outside labor organization, at the demand of the latter, while denying such authority to the employer at the demand of an inside labor organization, denies the members of the inside organization the equal protection of the laws.

ARGUMENT.

I(A). THE DECISION OF THE CALIFORNIA SUPREME COURT DEPRIVES PETITIONERS OF THE FUNDAMENTAL RIGHT TO SELF-ORGANIZE WITHOUT LET OR HINDRANCE OF THEIR EMPLOYERS, AGAINST THE GUARANTY OF THE WAGNER ACT AND THE DUE PROCESS CLAUSE OF THE XIV AMENDMENT.

(a) The right of employees to associate themselves together for the purpose of bargaining collectively, is a fundamental right.

In *Coppage v. Kansas,* 236 U.S. 1, 19, Pitney, J. says:

> "Of course we do not intend to say, nor to intimate, anything inconsistent with *the right of individuals to join labor unions,* nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. *Conceding the full right of the individual to join the union, etc.*"

In *American Foundries v. Tri-City Council,* 257 U.S. 184, 209, Taft, C. J. said:

> "The right to combine for such a lawful purpose has in many years not been denied by any Court."

In *T. & N. O. Ry. Co. v. Ry. Clks.,* 281 U.S. 548, 570, Hughes, C. J. said:

> "It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay, and conditions of work. (Citing the Tri-City case, supra.) Congress was not required to ignore this right of the employees, but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. * * * Thus, the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional rights of either, was based on the recognition of the rights of both."

In *Labor Board v. Jones & Laughlin,* 301 U.S. 1, 33, Hughes, C. J. said:

> "That (the right of employees to self-organize and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer) is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its own business and

select its own officers and agents. Discrimination and coercion to prevent the free exercise of the rights of employees to self organization and representation is a proper subject of condemnation by competent legislative authority."

In *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 263-4, Hughes, C. J. said:

"Neither this provision (Wagner Act, 49 Stat. 449, Section 7) nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 34, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purpose' as the employer has 'to organize its business and select its own officers and agents'; that discrimination and coercion 'to prevent the free exercise of the right of employees to self organization and representation' was a proper subject for condemnation by competent legislative authority. We noted that 'long ago' we had stated the reason for labor organizations,—that through united action employees might have 'opportunities to deal on an equality with their employer'; referring to what we had said in Amer. Steel Foundries v. Tri-Cities Central Council, 257 U.S. 184, 209. And in recognition of this right, we concluded that Congress should safeguard it in the interest of interstate commerce and seek to make appropriate collective action an 'instrument of peace rather than of strife'. To that end

Congress enacted the National Labor Relations Act."

(b) Congress has repeatedly recognized and guaranteed this right.

Congress recognized this right in Subd. 3 of Section 2 of the Railway Labor Act. (44 Stats. 577)

I(B) THE NORRIS-LA GUARDIA LAW GUARANTEES THE EMPLOYEES RIGHT OF FREE SELF-ORGANIZATION.

It recognized this right in the Norris-La Guardia Law. (47 Stats. 70 Section 2) Though that is a mere declaration of policy for the construction of that law, it has necessary implications. It forbids contractual arrangements to the contrary. As the California Supreme Court pointed out in the present case, in construing the identical language of Section 923 of the California Labor Code (see Appendix), "this necessarily means that employee organizations are unlawful when they are formed, subservient to the employer's will, chiefly in order to forestall the unionization of his plant by independent labor unions." (R. 40)

In *T. & N. O. R. Co. v. Ry. Clks.,* 281 U.S. 548, 368, Hughes, C. J. said:

> "* * * subdivision third of Section 2 of the Rail Labor Act (44 Stat. 577) providing that 'representatives for the purpose of this act shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives of the other'" [is]

> "* * * a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation," [and] "cannot be disregarded".

Finally, Congress fully recognized the right and provided a speedy means of its vindication. in the Wagner Act. (49 Stats. 453, Sections 1, 7, 8)

In *Labor Board v. Fansteel Metal Corp.,* 306 U.S. 240, 255, Hughes, C. J. said:

> "We think the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. (Citing Labor Board v. Jones & Laughlin, 301 U.S. 1, 33) To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. (Citing Assoc. Press v. Labor Board, 301 U.S. 103.)"

(c) California fully recognized the right.

California recognized this right in Sections 920 to 923 of the Labor Code of California. (Cal. Stats. 1937. Ch. 90. See Appendix)

The right of employees to self-organize guaranteed by the Wagner Act, the Norris-La Guardia Law, and the Due Process Clause of the XIV Amendment includes the right of selecting the form of their organization, whether an "outside" union, or an "inside" union, and it has even been held, to remain unorganized.

In *Labor Board v. Sterling Motors Co.* (CCA-9 1940), 109 Fed. (2) 194, 201-2, the Court says:

> "The facts of this case compel the consideration of the dilemma confronting the employees of these smaller independent industrial units. * * * This dilemma for these man and men everywhere in the United States in these smaller plants has three alternative solutions.
>
> "One alternative is to join the great internationals or associations. These give added power often to correct abuses which otherwise could not be remedied. However, they may have a remote control by men, sometimes with power almost autocratic but unfamiliar with the particular small plant problems. They collect larger dues, often to support general sympathetic strikes with which the employees of the independent plant may have no sympathy, and sometimes to be spent in aid of office seekers to whom they are opposed. Into these larger associations the small plant employees are sometimes forced by outside picketing and sometimes by actual violence. When so forced their collective bargaining agent may be designated by methods as remote from 'their own choosing' as where the employer influences or dominates their choice.
>
> "Another alternative is the so-called 'inside union'. While this is exposed to possible employer domination by the very intimacy of the small plant activities, where properly organized it has 'the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee' recognized and approved by the Supreme Court.

Texas & N. O. R. Co. v. Railway & S. S. Clerks, 281 U.S. 548, 568, 50 S. Ct. 427, 433, 74 L. Ed. 1034. In these normal relations the employees often learn whether the plant is prosperous or is running at such a loss that any increase in the wage factor of the cost sheet makes certain the shut-down of the plant entirely or in the department showing the larger red ink figures. That is to say, the employees know what pressure for their betterment will and what will not cause the loss of employment of all or of some of them. Obviously such a small union may be far more advantageous to its members than one under the remote control of policy makers thousands of miles away.

"The third alternative for the small plant seems almost ignored in the titanic struggle for power of nation-wide internationals and associations, though the right to choose it is as worthy of the consideration of courts and legislatures as either of the other two. That is the right not to join or create or assist any labor organization at all, but to deal individually with the employer. What we have described above regarding the result of 'normal relations and innocent communications' between employers and employees properly may lead the latter to choose to remain unorganized. The Supreme Court construes a predecessive statute for the protection of collective bargaining as not prohibiting the employer's 'entering into such contract of employment as it chooses, with its individual employees,' Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 557, 57 S. Ct. 592, 604, 81 L. Ed. 789, and puts a like construction upon the Na-

tional Labor Relations Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352. In a proceeding seeking to destroy a labor organization, we do not interpret the intent of Congress in enacting the Labor Board legislation to have established any presumption that employees are always to be deemed to be aiding a violation of the Act if they prefer no organization and decline to create one.

"Each of these three rights is of equal value and in administering the National Labor Relations Act is entitled to the protection of the Board."

(d) The right has been held a property right.

This right freely to self-organize has been held to be a property right sufficient to support injunctive relief under Section 20 of the Clayton Act. (38 Stats. 738 Section 20; 29 U.S.C.A. Section 52)

In *T. & N. O. R. Co. v. Ry. Clks.,* 281 U.S. 548, 571, Hughes, C J. said:

"* * * if it could be said that it was necessary in the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the statutory requirement (citing Coppage v. Kansas, 236 U.S. 1, 14, 15)."

In *Virginian Ry. Co. v. System Federation* (CCA-4 1936), 84 F (2d) 641, 644, Parker, Circ. J. said:

"The right to self-organization and representation in the matter of rates of pay, hours of labor, and working conditions is a property right, the loss of which would result in irreparable damages to complainants."

And in the nature of things this is so. All private personal rights, other than political are either personal rights (i. e., rights in respect to one's own person) or property rights (i. e., all rights other than personal rights). And the right to self-organize is just as true a property right as the right to enter a partnership, joint venture, voluntary association, or a corporation.

I(C). **BUT CALL IT LIBERTY OR PROPERTY, A STATE CANNOT DEPRIVE A PERSON OF IT WITHOUT DUE PROCESS OF LAW UNDER THE XIV AMENDMENT.**

Coppage v. Kansas, 236 U.S. 1, 14-15.

(e) Where the right is recognized and declared by statute, and is capable of judicial enforcement, it cannot be disregarded by the courts, and must be judicially enforced.

T. & N. O. Ry. Co. v. Ry. Clks., 281 U.S. 548, 568.

In this case, a prima facie tort is sought to be justified as concert of action in the "business interest" of defendants. But if their purpose to coerce the employer into coercing petitioners into joining their union runs counter to the policy of the Federal law,

or to rights guaranteed thereby, their conduct becomes a conspiracy to coerce the employer to violate the Federal law and to punish and oppress petitioners for exercising a right given by Federal law, under 18 U.S.C.A. Section 51.

(f) The decision of the State Supreme Court declared that California's common law, and the California Labor Code Section 921, 923, authorized an outside Labor Union to coerce the employer to coerce the petitioners, already self-organized under the Wagner Act, into joining the outside Union. Petitioners were already self-organized and had selected representatives of their own choosing under the Wagner Act. The effect of the decision was to override their own self-organization, and authorize the coercion of petitioners into accepting representatives not of petitioners' own choosing, but of defendants' choosing, in whom petitioners had no confidence at all. This was a clear violation of the policy of Congress as declared in both the Norris-La Guardia Law and the Wagner Act, and of the "fundamental" and constitutional right of petitioners.

The Wisconsin Supreme Court recognized this conflict under their "Little Norris-La Guardia Law". In

> *American Furniture Co. v. Brotherhood of Teamsters, etc.* 222 Wis. 338, 268 N.W. 250, 264-5,

Wickhem, J. says:

> "It may well be that if, when negotiations for a closed shop are initiated between an outside labor

> union and an employer, the employees have already exercised, free from their employer's domination, or are in the process of so exercising their right to organize and to select representatives for collective bargaining, the employer may not insist that another or different plan of organization be adopted or that other representatives be chosen. If he may not, then no pressure may be brought to bear upon him by an outside union to compel such action."

That is just exactly what the California Court has authorized here, coercion of the employer to coerce petitioners who already have their own self-organization and bargaining representatives, in whom they have confidence, to join defendants' organization, in which they have none.

IIA. THE RIGHT CLAIMED BY PETITIONERS WAS ADEQUATELY INVOKED.

Petitioners alleged that the employer was engaged in the business of selling and repairing automobiles (R. 2) and they had "united and organized" and appointed a committee to negotiate rates of pay, wages, hours of labor and other conditions of employment with the said company, *in accordance with the terms of the Wagner Labor Relations Act,*" notified the company and the Regional Director of the Labor Board of their action. The company recognized the committee as petitioners' bargaining agent for the sales force. (R. 4)

In view of the all-touching applications of the Wagner Act, and its all-pervasiveness, that necessarily al-

leged that petitioners and their work were subject to the Wagner Act, and adequately notified the courts below that petitioners claimed their rights under the Wagner Act.

> *M. K. & T. Co. v. Wulf,* 226 U.S. 570, 573-4;
> *Seaboard Air Line v. Duvall,* 225 U.S. 477, 482;
> *Grand Trunk v. Lindsay,* 233 U.S. 42, 48.

In *Green Bay Co. v. Patten Co.,* 172 U.S. 58, 67, the Court says:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

In *Cissna v. Tennessee,* 246 U.S. 289, 293, the Court says:

> "If the Supreme Court of the State treated Federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised. Mendrich v. Lowenstein, 232 U.S. 236, 243; N. Ca. R. Co. v. Zachary, 232 U.S. 248, 257; Mallinckrodt Works v. St. Louis, 238 U.S. 41, 49."

Here the Court used force to try to avoid deciding the federal question.

The adequacy of the raising of the federal question is itself a federal question.

Carter v. Texas, 177 U.S. 442;
Erie R. Co. v. Purdy, 185 U.S. 442;
Bank v. Anderson, 269 U.S. 341.

IIB. THE AUTOMOBILE BUSINESS IS AN INTERSTATE BUSINESS.

In this case everyone in the case knew and understood that the Howard Company ("Seabiscuit" Howard) was the San Francisco Agent for the Buick Automobile made at Flint, Michigan, that they were in interstate commerce beyond peradventure.

The law of California required a Court to take judicial notice of the way in which business is done.

In *Abbey Co. v. San Mateo County,* 167 Cal. 434, 439, the Court says:

> "The practice (cremation) has become so general and crematories are now so common in many of the larger cities of the United States that the Courts may take judicial notice of the usual method of operation."

Midland Co. v. Rudneck, 188 Cal. 265, 268;
People v. Assoc. Oil Co., 211 Cal. 93;
So. Cal. Co. v. Alberti, 58 Cal. App. 84, 87;
Koepple v. Morrison, 84 Cal. App. 137, 140;
Madigan v. Hale Co., 90 Cal. App. 151, 154;
People v. Crowl, 28 Cal. App. (2d) 299, 305 (that tool kits are usually included when an automobile is sold).

There are no automobile manufactories in California.

This case arose in 1937.

Calif. Code of Civil Procedure, Section 1875, sub. 3, reads:

> "Courts take judicial notice of the following facts:
>
> 3. Public and private official acts of the legislative, *executive* and judicial *departments* of this state and of the United States."

The Biennial Census of Manufacturers of the United States Department of Commerce for 1937, Part II, Table 1, pages 4 to 13, shows the industries of California by cities. There are no automobile factories listed. Under "Motor Vehicle Bodies" will be found a few body building works in the Los Angeles District only.

The report of the United States Commissioner of Internal Revenue for the year ended June 30, 1938, Table 1, page 70, shows no automobile factories in California, and under the head of "Automobile Chassis and Bodies" shows $25,235.58, total manufacturers tax collected in the First District of California (San Francisco) and $119,650.26 total manufacturers tax collected in the Sixth District of California (Los Angeles). Compare this with Michigan $40,285,265.11, Illinois $1,005,795.42, Indiana $1,105,643.46, and Ohio $444,774.79.

The California contribution came from : (1) Auto body building plants; (2) The assembly plants of the Ford and Chevrolet companies which import all their parts from Michigan.

There are no automobile factories in California. Everybody in California knows it. The Supreme Court of California should have judicially known this fact.

The business is done by taking an order for a car, and then causing it to be shipped into California from the state of manufacture.

In *Moore v. Pleasant Constr. Co.* (Ariz. 1937) 72 Pac. (2) 573, the Court says:

> "As we know from common knowledge, such materials (cement, steel, nails, etc., used by construction contractors) are not produced or manufactured in this state, or at most only a small portion of them, but are shipped in from the outside, no tax whatever would be paid, the sale to the contractor not being made in this state."

The refusal of the Court to take judicial notice of the way in which the automobile business is done in California, was a reversal of its former position at a time when it was too late for petitioners to meet it, and brought the case squarely within

Brinkerhof Trust Co. v. Hill, 281 U.S. 673.

III. EMPLOYEES MAY EXERCISE THIS RIGHT TO SELF-ORGANIZE EVEN THOUGH THE EMPLOYER IS NOT ENGAGED IN INTERSTATE COMMERCE.

The Wagner Act, by its terms, applies, not only to what is technically interstate business, but to any business, interstate or local, in which strikes and other forms of industrial strife and unrest, having

the intent or the necessary effect of burdening or obstructing commerce by materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods *from* or *into* the channels of commerce. (49 Stats. 449, Section 1, par. 1, Section 2, subdivisions (6) and (7)) As this Court has so well pointed out, the power of Congress is protective as well as corrective. It may be, and in the Wagner Act has been, exerted to strike down any threat to interstate commerce, whether from the inside or from the outside.

In *Labor Board v. Fainblatt,* 306 U.S. 601, 604, Stone, J. says:

> "It has been settled by repeated decisions of this Court that an employer may be subject to the National Labor Relations Act although not himself engaged in commerce."

The Court has so perfectly stated the rule that we forbear to quote.

> *Labor Board v. Jones & Laughlin,* 301 U.S. 1, 34-49;
> *Edison Co. v. Labor Board,* 305 U.S. 197, 222;
> *Labor Board v. Bradford Assn.* 310 U.S. 318, 326; 60 S. Ct. 918, 922.

Rome has spoken. Conflict in the circuits is a squabble among the monks.

The cavalier disposition of the point by the Supreme Court of California in saying that petitioners didn't allege the employer was in interstate commerce was beside the mark.

It is important to note here that the only exceptions in the definition of "employee" in Section 2 (3) of the Wagner Act is the express exclusion therefrom of farm labor, domestic help and employees of a parent or spouse.

IV. THE RIGHT OF EMPLOYEES TO SELF-ORGANIZE IN AN APPROPRIATE BARGAINING UNIT, WITHOUT EMPLOYER INTERFERENCE, DOES NOT DEPEND ON CERTIFICATION OF THEIR ORGANIZATION BY THE LABOR BOARD AS THE PROPER BARGAINING UNIT.

In *T. & N. O. Ry. Co. v. Ry. Clerks,* 181 U.S. 548, 557, it not only did not appear that the Railroad Labor Board had held an election or had certified the plaintiffs as a proper bargaining unit, but it affirmatively appeared they had not.

The terms of the lower Court's contempt order were in effect: that to purge itself of contempt the Railroad Company should completely "disestablish the Association of Clerical Employees", as then constituted, as the recognized representative of its clerical employees, and should reinstate the plaintiff Brotherhood as such representative, until such time as these employees by a secret ballot *taken in accordance with the further direction of the Court,* without employer interference, should choose other representatives. (p. 557)

Note, that the Court devised its own scheme of election and certification.

The California Court thought it could not do that.

Note, too, that the Court would never have made such an order, and would not have had to, if the Railroad Labor Board had held election or certified.

In *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 236-7, it appeared that the employer had already entered into bargaining contracts with Brotherhood of Electrical Workers, affiliated with the A. F. of L. recognizing them as exclusive bargaining agents for their own members employed by it, numbering about 80% of the employees in its crafts. There had never been an election or certification, though the Labor Board had ordered the Brotherhood disestablished.

Hughes, C. J. said:

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who

are its members. The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9 (c). Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period."

In *Labor Board v. Sterling Electric Motors* (CCA-9 1940) 109 Fed. (2) 194, there had been no election or certification, but the Court annulled a disestablishment order against the employees' inside union.

In *Ballston, etc. Co. v. Labor Board* (CCA-2 1938 98 Fed. (2) 758, there was no election or certificatio by the Labor Board, but a cease and desist orde forbidding the employer to recognize the inside unio was set aside. The Court says (p. 762, col. 1):

> "A union limited to the employees of a sing employer is as legal as any other."

The employer freely recognized petitioners' action in self-organizing and selecting representatives their own choosing, just as the employer did in th *Consolidated Edison* case, supra, the *Sterling Moto* case, supra, the *Ballston Co.* case, supra.

Under these circumstances, an election and cert fication by the Labor Board is impossible. The boar has no jurisdiction to move in on a consenting em ployer and order an election for the purpose of ce tification. Its jurisdiction to do so depends on a com plaint by injured employees or would-be employee against the employer for denial of the right.

Labor Board v. Columbian Co., 306 U.S. 29

In *Labor Board v. Piqua Co.* (CCA-6 1940) 10 Fed. (2) 552, 556, the Court says:

> "The Act assumed the existence of a quasi or con structive contract whereby a legal obligation wa imposed on the employer, even against his inten tion, to deal with an appropriate unit of his em ployees through their chosen representative con cerning the matters referred to in the statute an the Board is without jurisdiction until the em ployer has violated his obligation and a complain

has been lodged with the Board pursuant to Section 10 c of the Act. The employer acts at its peril in refusing to recognize a duly selected bargaining agency of an appropriate unit of his employees, unless the facts show that in the exercise of reasonable judgment he lacked knowledge of the appropriateness of the unit or the selection of the majority representative."

See also *Labor Board v. Griswold Co.* (CCA-3 1939) 106 Fed. (2) 713, 717-8.

V. **TO AVAIL THEMSELVES OF THIS RIGHT, THE SELF-ORGANIZING EMPLOYEES NEED NOT EMBRACE ALL OF THE EMPLOYEES, NOR ALL OF THE CRAFTS IN THE EMPLOYER'S BUSINESS.**

All of the sales division was an appropriate unit. It was certainly not an inappropriate unit. They may assert the right to bargain collectively for their members until the Labor Board, on proper complaint, orders an election and certifies a different bargaining unit.

Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 236-7 supra (80% of the men);

Labor Board v. Del. Ferry Co. (CCA-3 1937) 90 Fed. (2) 520 (all the marine engineers; deck hands, dock hands, and ship's officers not included. Certiorari denied 302 U.S. 738);

Labor Board v. Remington-Rand, (CCA-2 1937) 94 Fed. (2) 862, 868 (3768 out of 6640 men);

Labor Board v. Hopwood Co. (CCA-2 1938) 98 Fed. (2) 97, 100;

Ballston Co. v. Labor Board, 98 Fed. (2) 758, supra;

Labor Board v. Griswold, 106 Fed. (2) 713, 718 (330 out of 370 men);

Labor Board v. Piqua Co., 109 Fed. (2) 552, 556, supra;

Labor Board v. Sterling Motors, 109 Fed. (2) 194, supra (49 out of 70 men).

It was the employer's duty, under the Wagner Act, to treat with petitioners.

In *Donnelly Co. v. Internat. Garment Workers Union* (CCA-8 1938) 99 Fed. (2) 309, 316 (certiorari denied 305 U. S. 662) the Court says:

> "The National Labor Relations Act expressly imposed the duty upon the plaintiff to bargain collectively only with the chosen representatives of their employees, and the implied duty not to bargain with anyone else on their behalf. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 57 S. Ct. 615, 627, 81 L. Ed. 893, 108 A.L.R. 1352. * * * It would seem that after receiving notice on March 2, 1937, of the refusal of their employees to accept defendant union as their representative for collective bargaining, the plaintiff (employer) could not reasonably have been expected to bargain collectively with that union with respect to either terms or conditions of employment or with respect to employee representation."

It was petitioners' right, under the Wagner Act, to have their employer treat with them. That duty the employer performed. That right the employer granted. The defendants' picket was a combination to prevent performance of that duty, and to deprive petitioners of that right.

VI. NOR NEED THE SELF-ORGANIZING EMPLOYEES HAVE OR SEEK OUTSIDE AFFILIATION BEFORE THEY CAN EXERCISE THEIR FEDERAL RIGHT.

The freedom of the individual worker to decline to associate with his fellows or with an "outside" union is just as much the concern of Congress as the right of his fellows to organize. In declaring the public policy of the United States in the Norris-La Guardia Law, 47 Stats. 70, Section 2 (Title 29 U.S.C.A. Section 102), Congress says:

> "* * * though he should be free to decline to associate with his fellows, * * *."

In *Labor Board v. Link-Belt Co.* (Jan. 6, 1941) 61 Sup. Ct. 358, 360-1, Douglas, J. says:

> "An 'inside' union, as well as an 'outside' union, may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing' guaranteed by § 7 of the Act."

In *Labor Board v. Sterling Motors,* supra, 109 Fed. (2) 194, 203, the Court says:

> "We hold there is no merit in this contention of the Board, which, in its effect, is that Congress,

> in enacting in[to] Section 7 of the Act the right of employees either to 'self-organization', or to 'join' a union of their choice, intended a different criterion in the consideration of the action of this employer toward 'self-organized' inside associations from that toward an international such as the Brotherhood seeking to have the employees 'join' one of its units."

In *Ballston Co. v. Labor Board,* 98 Fed. (2) 758, at 762, supra, the Court says:

> "A union limited to the employees of a single employer is as legal as any other."
>
> *Labor Board v. Lion Shoe Co.* (CCA-1 1938) 97 Fed. (2) 448, 457;
>
> *Labor Board v. Hopwood Co.* (CCA-4 1938) 98 Fed. (2) 97;
>
> *Donnelly Garment Co. v. Garment Workers Union* (C.D. Mo. 1937) 21 Fed. Supp. 807, 809;
>
> *Donnelly Co. v. Garment Workers Union* (CCA-8 1938) 99 Fed. (2) 309, 316-7.

Nothing in the Wagner Act authorizes an employer to coerce his employees in aid to a union having "affiliation with any external labor organization," as the California Court seemed to think (100 C.D. 359). He is not privileged to pressure his men to join an outside union with national affiliations.

> *International Assn. v. Labor Board* (1940) 61 S. Ct. 83;
>
> *Labor Board v. Fansteel M. Corp.* (6th Point) 306 U.S. 240, 261-2.

VII. IF THE UNIT IS APPROPRIATE AND THE SELF-ORGANIZATION HAS BEEN IN GOOD FAITH AND FREE FROM EMPLOYER INTERFERENCE, THE EMPLOYEES MAY ASSERT THEIR RIGHT TO SELF-ORGANIZE, BEFORE ADOPTING A CONSTITUTION, BY-LAWS, PLEDGES OR RULES. THE CALIFORNIA COURT'S SUGGESTION TO THE CONTRARY WAS WHOLLY ERRONEOUS.

To avail themselves of this right, the workers must first meet and organize. This act is a part of the exercise of the right.

If this is not so, how can the men ever get started?

This point was raised in *Labor Board v. Sterling Motors,* supra. There it appeared that 49 out of 60-70 workers in the plant organized simply by all signing an informal organization agreement.

The Court said (109 Fed. (2) 194, 202):

> "We hold that the self-organization evidenced in the document and creation of the committee is such a 'labor organization' as is recognized by Sections 7, 2(4) and 2(5) of the Act. It does not matter that there were no charter or by-laws or dues as in many other unions. Without these, there was self-organization for the purpose of dealing with the employer."

In *Ballston Co. v. Labor Board,* 98 Fed. (2) 758, 761, it appeared the committee had engaged their own attorney to draft the constitution and by-laws, and paid their expenses. But it did not appear that this had been done.

In New York associations may sue in their associate name.

In *Ebbinghausen v. Worth Club,* 4 Abb. N.C. 300, the New York Supreme Court held that such associations may sue, though they have no constitution, by-laws or rules.

To the same effect are:

Ackerman v. Scheutzverein, 60 S.W. (Tex.) 366;

McLaughlin v. Wall, 105 Pac. (Kan.) 33.

But here we did not sue in our associate name. The members sued as such individually.

But this assertion by the Supreme Court of California, assumed as it was on demurrer without any support in the record, that petitioners' organization lacked constitution, by-laws, rules and pledges is in truth directly contrary to the fact, as we could easily have demonstrated if the Court's ruling had not denied us all opportunity to do so.

VIII. TO IMPOSE ON FREELY SELF-ORGANIZING WORKMEN THE BURDEN OF NEGATIVING ALL UNITY OF INTEREST BETWEEN THEMSELVES AND THEIR EMPLOYER, AS THE CALIFORNIA COURT DID, IS TO HINDER, OBSTRUCT AND BURDEN PETITIONERS IN THE ASSERTION OF THEIR FEDERAL RIGHT.

Company domination is an affirmative matter. The burden is on the person asserting it to prove it by "substantial evidence" not conjecture.

Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229, and cases cited;

Labor Board v. Columbian Co., 306 U.S. 292, 300;

Labor Board v. Sterling Electric Motors, 109 Fed. (2) 194, 205 (citing and quoting California Code of Civil Procedure, Section 1963 (19));

Labor Board v. Bell Oil Co. (CCA-5 1938) 98 Fed. (2) 870.

In *Labor Board v. Abell Co.* (CCA-4 1938) 97 Fed. (2) 951, 957, the Court says:

"There is, however, no justification for the position that spontaneous action on the part of the men is so improbable as to warrant the inference that it was inspired by the management. The promotion of the union originated outside the shop and did not spring from the dissatisfaction of the men with their wages and working condition, and the formation of the committee designed to represent the men in place of the union, and its failure to present any grievances in the short interval between its formation in June, and the hearing in September, 1937, (In the present case the formation was in May, 1937, and the picket controversy arose in August of 1937) tend to prove that there were no grievances to present, rather than that the committee was a sham imposed by the management upon the men. The choice between Union and Committee was presented to the men; its free exercise was guaranteed in the 'right to self-organization' and 'to bargain collectively through representatives of their own choosing', conferred by Section 7 of the Act, 29 U.S.C.A. §157; and there is no sufficient evidence in this case of interference or domination on the part of the employer. In this

respect the burden of proof was on the Union, and while the charge was supported only by conjecture and suspicion, it was refuted by positive and direct testimony. The failure of the Board to credit this testimony does not supply the lack of affirmative proof of unfair labor practice on the part of the employer."

Appalachian Power Co. v. Labor Board (CCA-4 1937) 93 Fed. (2) 985, 989.

When a right is given or recognized by Federal law, it is not competent for a State Court to embarrass its exercise by erecting against it presumptions or burdens of proof or allegation, particularly in violation of the Code rules of that State. (Calif. Code of Civil Procedure, Sections 452, 1963 (1), 1963 (19)). (R. 75)

Morrison v. California, 291 U.S. 82;
P. v. Tilken (1939) 34 C.A. (2) 743, 748, 750, 752;
Western Railroad v. Henderson, 279 U.S. 639.

Under the Federal system one sovereign may not so embarrass the operation of the laws of the other.

McCulloch v. Maryland, 4 Wheaton 316;
Sinnott v. Davenport, 22 Howard 227.

In *North Dakota v. Hanson,* 215 U.S. 515, 525, the Court says:

"* * * it is clear that in principle a State may not so exert its police power as to directly hamper or destroy a lawful authority of the Government of the United States."

Compare:

People v. Gates (1870) 43 N.Y. 40;
Moore v. Moore (1872) 47 N.Y. 467.

In this case none of the "congeries of facts" (we, too, studied under Hohfeld) accepted by the Court as indicia of company control were present. It was clearly alleged that *all* the other crafts in the Howard plant were manned by members of unions affiliated with the Labor Council, and therefore could not pass a picket line, and that that circumstance produced the cesser of work and the damage to the employer resulting in defendants' coercion of it to coerce petitioners. The Supreme Court of California called this cesser of work a "strike" (though there was no strike vote and no strike benefits, and "sympathetic strikes" violate the law and the rules of the A. F. L.) and it declared the picket was a "concomitant" of the strike.

The situation thus alleged conclusively negatives any employer "hostility towards an 'outside' union."

Labor Board v. Link Belt Co., 61 Sup. Ct., 358, 361.

IX. THE ACTION OF THE CALIFORNIA SUPREME COURT, IN THE FINAL DISPOSITION OF PETITIONERS' APPEAL, PURPORTING TO FIND AND RECITE, ON NO EVIDENCE, AND NOTHING IN THE RECORD TO SUPPORT IT, THAT PETITIONERS, FREELY SELF-ORGANIZING EMPLOYEES, "HAVE NO CONSTITUTION, BY-LAWS, PLEDGES OR RULES", AND THAT THERE IS AN "APPARENT UNITY OF INTEREST" BETWEEN THEM AND THEIR EMPLOYERS, IS ITSELF A DEPRIVAL OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW WITHIN THE XIV AMENDMENT.

A finding and recital of fact, finally disposing of a litigant's case, based on no evidence at all or on anything in the record, is not due process of law.

Labor Board v. Bell Oil Co. (CCA-5 1938) 98 Fed. (2) 870;

Labor Board v. Columbian Co., 306 U.S. 292;

Yamataya v. Fisher, 189 U.S. 86;

U. S. v. Williams, 200 Fed. (CCA) 538, 541;

U. S. v. Williams, 189 Fed. 915 (affd 206 Fed. (CCA) 460);

U. S. v. Williams, 175 Fed. 274;

Wong Tsich Wye v. Nagle (CCA-9 1929) 33 Fed. (2) 226.

X. THE DECISION OF THE SUPREME COURT OF CALIFORNIA CONSTRUING THE COMMON LAW OF THE STATE AND SECTION 921 OF THE LABOR CODE OF CALIFORNIA, SO AS TO AUTHORIZE AN EMPLOYER TO COERCE MEMBERS OF AN INSIDE LABOR ORGANIZATION AND OTHER EMPLOYEES, TO JOIN AN OUTSIDE UNION AT THE DEMAND OF THE LATTER, WHILE DENYING SUCH AUTHORITY TO THE EMPLOYER AT THE DEMAND OF PETITIONERS' ORGANIZATION DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS AGAINST THE PROVISIONS OF THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT.

Section 921 of the California Labor Code reads:

"921. Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

"(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization.

"(b) Not to join or not to remain a member of a labor organization or of an employer organization.

"(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

"Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge or induce,

without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

The decision of the California Supreme Court has construed this section as if the word "inside" or "plant" were interpolated before the words "labor organization" in Section 921 (a), or as if the words "without outside affiliation" were interpolated after them, although the same words in subsections (a) and (b) are to be given a latitudinarian construction; thus permitting an employer to exact as a requirement of employment membership in an outside union, at the demand of such outside union, while at the same time not permitting the employer to exact as a requirement of employment membership in petitioners' association.

In other words, defendants were held authorized to picket the employer to compel him to coerce petitioners into joining their union, though the employer is denied authority to exact (or coerce) membership in petitioners' organization as a condition of employment. Defendants may coerce the employer into a violation of the Wagner Act.

International Assn. v. Labor Board, 61 S. Ct. 83.

Granting to defendants this privilege or immunity denies to petitioners the equal protection of the law.

Petitioners may not bargain with their employer for a closed shop as to their organization, but defendants are authorized not only to bargain for but to compel a closed shop for their organization.

Memembership in defendant organizations is a matter of grace. Defendant organizations are the sole judges of their own membership.

Coppage v. Kansas, 236 U.S. 1, 16, 19-20.

Yet these private organizations have been authorized by the state to coerce an employer to coerce his employees to join their unions, while authority is withheld from petitioners to even suggest to the employer that he do the same for petitioners' organization.

By the Court's own construction of Section 923 of the Labor Code, such company aid to an inside organization makes the union itself illegal. (R. 40) But identical company aid to the outside union is privileged.

To this extent the decision of the Supreme Court of California denies petitioners the equal protection of the laws, as the District Court of Appeals pointed out in its opinions. (89 Pac. (2) 426, 431; 90 Pac. (2) 113, 115)

In *Coppage v. Kansas,* 236 U.S. 1, 20, Pitney, J. says:

> "Can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not;"

By the same token there cannot be one rule of liberty for a labor union with outside affiliations and a

different and more restrictive rule for petitioners and their organization.

This is not private action. It is action authorized by the state. When the state purports to authorize such action by a closed-charter group, the action is state action, just as truly as if it were done by a duly constituted state agency. It is the authorizing that makes it the state action that is leveled on by the amendment.

> *McCabe v. Santa Fe Ry. Co.*, 235 U.S. 151;
> *Nixon v. Condon*, 286 U.S. 73.

Thus the action of the Railroad Company authorized to provide unequal accommodations for black and white passengers in the *McCabe* case, became state action.

And the action of a party executive committee, authorized to exclude negroes from membership in the party, became state action in the *Nixon* case.

Equal protection of the laws requires the employer should not be privileged to coerce his employees for the benefit of either an outside or an inside union.

> *International Assn. v. Labor Board* (1940) 61 Sup. Ct. 83.

Concededly he ought not to be privileged to coerce his employees into joining petitioners' organization, under the Wagner Act or the Norris-La Guardia Law, nor under Sections 921 and 923 of the California Labor Code, at petitioners' request or otherwise. Neither should he be privileged to coerce his em-

ployees into joining defendants' union, on their demand, or on his own initiative. To so privilege his coercion for defendants' benefit, while forbidding it for petitioners' benefit, denies petitioners equal protection.

> "It does not prescribe a rule and conditions for the regulation of the use of property (petitioners' right of self organization without employer interference) * * * to which all similarly situated may conform", but leaves petitioners "tenants at will under (defendants) * * * of their means of living." (Yick Wo vs. Hopkins, 118 U.S. 356, 368)
>
> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (Id. p. 370)

This result of the decision was a new and surprising one.

CONCLUSION.

It is petitioners' contention that the right of workers to self-organize without employer interference is a fundamental right, a constitutional right, part and parcel of the liberty and property protected from state interference by the due process clause of the XIV Amendment; that when the state, by law or the construction thereof, seeks to authorize the employer to coerce his workers into joining any particular union, outside or inside, at the demand of such union, state action has deprived the workers of liberty and property without due process of law.

That whether the right is a constitutional right or not, the right has been guaranteed by Federal law, expressly by the Wagner Act, and by necessary implication by the Norris-La Guardia Law.

It has been guaranteed by the law of California under Section 921, 922 and 923 of the California Labor Code. (See Appendix)

The construction of those sections by the California Supreme Court has deprived petitioners of that right, fully and properly invoked by petitioners.

Briefly, the Court has held that although the employer may not coerce the petitioners himself, yet defendant unions may coerce him to do so, that defendants may lawfully coerce petitioners' employer to violate his duty under the Wagner Act and the Norris-La Guardia Law. The employer must violate Section 8 (2) of the Wagner Act, or suffer destruction of his business.

The Court has denied petitioners their Federal right on wholly untenable grounds.

It has wrongfully held that employees have no right to free self-organization under the Wagner Act, or under the Norris-La Guardia Law or under the Fourteenth Amendment, unless their employer is engaged in interstate commerce, that they have no right to self-organize in an appropriate bargaining unit unless and until certified as such by the Labor Board; that employees cannot freely self-organize in an appropriate bargaining unit if they are only a portion of the employees in the plant; that they may not freely self-organize if they have no constitution, by-laws, rules or pledges; that they may not freely self-organize unless they "negative" affirmatively all "unity of interest" between themselves and their employer, erroneousy erecting a burden of proof and of pleading against petitioners' Federal right.

The Court erroneously and untruly found and recited, on no evidence at all, and on nothing in the record, that petitioners had no constitution, by-laws, etc., and that there was "unity of interest" (whatever that may mean. Doubtless something short of war) between petitioners and their employer, in violation of the due process clause of the Fourteenth Amendment.

Finally, the decision wrongfully purports to authorize the employer, when pressured by an outside union, to foster and aid such union to unionize his plant, in clear violation of the Wagner Act, while at

the same time denying him that privilege at the instance of petitioners or any one else, in violation of the equal protection clause of the Fourteenth Amendment.

For all the foregoing reasons, the Writ should issue and the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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